

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MELVIN JONES, JR., ) 1:05-CV-0148 OWW DLB  
Plaintiff, ) MEMORANDUM OPINION AND ORDER  
v. ) RE PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT (DOC. 104)  
MICHAEL A. TOZZI et al., ) DEFENDANT'S MOTION FOR LEAVE  
Defendants. ) TO LATE-FILE AN OPPOSITION  
(DOC. 120) AND PLAINTIFF'S  
MOTION TO STRIKE THAT  
OPPOSITION (DOC. 117)  
PLAINTIFF'S MOTION TO AMEND  
THE COMPLAINT (DOC. 166)

## I. INTRODUCTION

Before the court for decision are several related motions:

(1) Plaintiff Melvin Jones' Motion for Summary Judgment and related filings (Docs. 104, 106, 108, 112, 115, 132, 148); (2) Defendant John Hollenback's motion to late-file his opposition to the same (Doc. 120); Plaintiff's motion to strike the late-filed opposition (Doc. 117); and Plaintiff's request for leave to file a second amended complaint (Doc. 166). Also pending are numerous motions related to discovery (e.g., protective orders, motions to compel, etc.). Such motions are to be heard and decided by the

1 presiding United States Magistrate Judge.<sup>1</sup>

2

3 **II. PROCEDURAL HISTORY**

4 This case arises out of a child custody dispute between  
5 Plaintiff and Kea Chhay, the mother of Plaintiff's minor child.  
6 The case was first filed in Santa Clara Superior Court, but was  
7 later transferred to Stanislaus County. Additional background  
8 concerning the state proceedings is set forth in various  
9 memorandum opinions in this case and related cases.<sup>2</sup>

10 Plaintiff filed his initial complaint on February 3, 2005.  
11 (Doc. 1.) Then, prior to the filing of any responsive pleading  
12 by Defendant, Plaintiff filed a first amended complaint on March  
13 3, 2005. (Doc. 7.) The first amended complaint named as  
14 defendants: Michael A. Tozzi, the Executive Officer of  
15 Stanislaus County Superior Court; Superior Court Judge Marie  
16 Sovey-Silveria; and attorneys Leslie Jensen and John Holenback.

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17 <sup>1</sup> Plaintiff also points out in his "reply to opposition  
18 per hearing on 12-12-2005" that various motions and/or filings  
19 remain pending in this case. (Doc. 148 at 4.) Many of the  
20 filings to which Plaintiff refers are "requests for judicial  
21 notice" in which Plaintiff makes legal assertions and quotes at  
22 length from various court documents and judicial decisions. (See  
23 e.g., Docs. 116, 119, 129.) This is not a proper use of a  
24 request for judicial notice, which is generally used to seek  
25 admission of documents that are judicially noticeable under  
26 Federal Rule of Evidence 201 and contains matters not subject to  
dispute. Plaintiff's practice of using a request for judicial  
notice for other purposes confuses the record. It is not  
necessary for the court to take judicial notice of published  
judicial decisions or of documents that are part of the record of  
this case. Plaintiff may simply cite to these sources in his  
legal papers.

27 <sup>2</sup> See *Jones v. California*, 1:04-CV-065676; *Jones v.*  
28 *Strangio*, 1:04-CV-06567; and *Jones v. Strangio*, 1:05-CV-00410.

1       Defendants Tozzi and Silveria moved to dismiss this  
2 complaint on March 9, 2005.<sup>3</sup> (Doc. 8.) Plaintiff opposed this  
3 motion (Doc. 13, filed Mar. 14, 2005), and moved for default  
4 judgment against defendants Jensen and Hollenback. (Doc. 14,  
5 filed Mar. 14, 2005.) Plaintiff then (improperly) filed an  
6 additional "counter motion" in opposition to Defendants Tozzi and  
7 Silveria's motion to dismiss, along with a motion to amend the  
8 complaint a second time. (Doc. 16, filed Mar. 24, 2005.) This  
9 motion to amend is still pending. Four days later, on March 28,  
10 2005, Plaintiff lodged yet another "second amended complaint" to  
11 "supercede" the second amended complaint that was attached to his  
12 motion for leave to amend. (Doc. 19, filed Mar. 28, 2005.)

13       On March 18, 2005, an order issued dismissing Plaintiffs  
14 related case, *Jones v. Strangio*. (See Doc. 72, 1:04-cv-06567.)  
15 In light of that dismissal, the district court ordered Plaintiff  
16 to show cause why this case should not be dismissed as well.  
17 (Doc. 18, filed Mar. 29, 2005.) Plaintiff responded to the order  
18 to show cause on April 20, 2005. (Doc. 29.) At the same time,  
19 Plaintiff filed yet another (third) proposed amended complaint  
20 intended to supercede the complaint lodged on March 28, 2005.  
21 (See Proposed "Second Amended Complaint" lodged Apr. 20, 2005.)  
22 This complaint contained numerous new allegations that Defendants  
23 made racially derogatory remarks to plaintiff as part of a  
24 conspiracy to violate his constitutional rights in contravention

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26       <sup>3</sup> On April 20, 2005, Defendants Jensen and Hollenback  
27 filed a motion to join the motion to dismiss filed by Defendants  
28 Tozzi and Sovey-Silveria. (Docs. 25, 26 & 27.) Their motion was  
not set for hearing, however, because it was improperly noticed.  
(See Doc. 30, filed April 20, 2005.)

1 of 42 U.S.C. §§ 1981, 1985, and 1986.

2 A memorandum opinion and order dated May 11, 2005 dismissed  
3 all claims against Defendants Tozzi and Silveria, denied  
4 Plaintiff's motion for default judgment against Defendants Jensen  
5 and Hollenback, and denied Plaintiff's motion for leave to amend  
6 the complaint a second time. (Doc. 47.)

7 On June 22, 2005, Defendants Jensen and Hollenback's motion  
8 to dismiss was granted, affording Plaintiff one final opportunity  
9 to amend the complaint. (Doc. 61.) A separate memorandum  
10 opinion, dated June 29, 2005, denied Plaintiffs' April 9, 2005  
11 motion for sanctions. (Doc. 65.) On July 6, 2005, Plaintiff  
12 voluntarily dismissed Defendant Jensen from the case. (Doc. 66.)  
13 Plaintiff then filed a second amended complaint alleging that  
14 Defendant Hollenback directed racially derogatory remarks at  
15 Plaintiff with the goal of deterring Plaintiff's participation in  
16 legal proceedings related to Plaintiff's family law case. (See  
17 Doc. 67, filed July 6, 2005.

18 Defendant Hollenback then moved to dismiss the second  
19 amended complaint on a variety of grounds. (Doc. 78, filed Sept.  
20 8, 2005.) Defendant Hollenback also moved for sanctions,  
21 alleging that Plaintiff made false statements in his amended  
22 complaint. (Doc. 91, filed Sept. 27, 2005.) Both motions were  
23 denied. (Doc. 103.)

24 Plaintiff then filed a motion for summary judgment. (Doc.  
25 104, filed Oct. 31, 2005.) Defendant failed to timely file an  
26 opposition. The court then issued a warning to Defendant about a  
27 litigant's obligation to file an opposition or statement of non-  
28 opposition at least fourteen days prior to the hearing pursuant

1 to Local Rule 78-230(c). (Doc. 118.) Defendant then filed a  
2 proposed opposition along with a request for leave to late-file  
3 the opposition. (Doc. 120, filed Dec. 5, 2005.) Plaintiff  
4 objected to granting Defendant leave to file this opposition and  
5 submits that he is entitled to judgment as a matter of law.  
6 (Docs. 115, 116, 119, 128 & 129.)

7 A hearing on the motion for summary judgment was set for  
8 December 12, 2005. Mr. Jones and counsel for Mr. Hollenback  
9 appeared, but decision on the motion for summary judgment was  
10 delayed to give Mr. Jones an opportunity to conduct discovery  
11 related to Defendant's assertion that the late-filing of his  
12 opposition was due to excusable neglect. (Doc. 133.)

13 Ms. Jensen, counsel to Defendant at the time the opposition  
14 was late-filed, submitted a declaration and supporting documents  
15 indicating that she was out of the country on vacation when the  
16 opposition was due and that, in part as a result of her absence,  
17 she and defendant mistakenly failed to file the opposition in a  
18 timely manner. (Doc. 139, filed Dec. 27, 2005.)

19 Plaintiff continues to object to the court's consideration  
20 of this late-filed opposition. (See Doc. 148.)  
21

### 22 **III. SUMMARY OF PLAINTIFF'S ALLEGATIONS**

23 The second amended complaint alleges that Defendant  
24 Hollenback became involved with Plaintiff's family law dispute in  
25 December 2003 as counsel for Ms. Chhay. (Doc. 67 at ¶44.)  
26 Plaintiff filed contempt charges against Ms. Chhay in early 2004.  
27 (*Id.* at ¶ 45.) Plaintiff alleges that on April 22, 2004,  
28 Defendant Hollenback told Plaintiff that he "called the  
Stanislaus County Housing Authority and told them what a lazy

1 low-life black piece of shit you are...you get nigger justice."  
2 (*Id.* at ¶ 47.) Plaintiff also alleges that Defendant Hollenback  
3 stated that "he would knock the teeth out of his black greasy  
4 face...and rattle them out of his jive-monkey ass if he showed up  
5 for the contempt hearings." (*Id.* at ¶48.) Plaintiff asserts  
6 that "as a direct and proximate cause of the defendant's threats,  
7 [he] withdrew [the] contempt charges...." (*Id.* at ¶ 51.) The  
8 complaint further alleges that the statute of limitations on the  
9 contempt charges expired in July 2004. (*Id.* at ¶ 54.) As a  
10 result, "Mr. Jones' access to the judicial system was deprived."  
11 (*Id.*)

12 In addition to his own declarations, Mr. Jones presents the  
13 declaration of his mother, Rosalind F. Jones, who states that she  
14 witnessed Defendant Hollenback make the above-described  
15 statements to Plaintiff. (Doc. 106.)

16 The complaint alleges that Defendant's alleged conduct  
17 deprived Plaintiff of his civil rights in violation of 42 U.S.C.  
18 § 1981 in seven different ways. Specifically, the complaint  
19 alleges that Defendant:

- 20 (1) deprived Plaintiff of his "federal right to sue on  
21 account of his race and ethnicity";
- 22 (2) deprived Plaintiff of his federal right to enforce  
23 contracts on account of his race and ethnicity";
- 24 (3) deprived Plaintiff of his "federal right to be a party  
25 to proceedings on account of his race and ethnicity";
- 26 (4) deprived Plaintiff of his "federal right to give  
27 evidence at proceedings on account of his race and  
28 ethnicity";
- 29 (5) deprived Plaintiff of his "federal right to full

1                   benefit of proceedings on account of his race and  
2                    ethnicity";

3                   (6) deprived Plaintiff of his "federal right to equal  
4                   benefit of all proceedings on account of his race and  
5                    ethnicity"; and

6                   (7) deprived Plaintiff of his "federal right to equal  
7                   benefit of all laws on account of his race and  
8                    ethnicity."

9                   *(Id. at ¶64-77 (emphasis added).)*

10                  The parties also make reference to a letter sent by Mr.  
11                  Jones to the court presiding over his family law case entitled  
12                  "Notice of Withdrawal of Contempt Hearing Without Prejudice."

13                  The Notice states:

14                  I Melvin Jones hereby declare that I am the Plaintiff  
15                  and moving party and Kea Chhay is the Defendant. I  
16                  hereby request that the amended contempt charges #23-25  
17                  be withdrawn without prejudice for the following  
18                  reasons:

19                  1.) Due to the matter(s) set-forth in my letter to the  
20                  Honorable Judge Wray Ladine dated 4-23-04, sent  
21                  regular mail on 4-23-04 and sent via Express mail  
22                  #ER 899883487 US.

23                  2.) To allow appropriate time for formal investigation  
24                  by the Commission on Judicial Performance  
25                  regarding matters set forth in said letter and my  
26                  detailed formal complaint.

27                  3.) My overwhelming concern for the safety of myself,  
28                  and my perspective witness' [sic] appearing on my  
29                  behalf.

30                  4.) Due to my concern that further violation(s) of my  
31                  Civil and Constitutional Rights will occur.

32                  I declare under the penalty of perjury and under the  
33                  Laws of the State of California that the foregoing is  
34                  true and correct.

35                  Dated this 7th Day of May, 2004

/s/ Melvin Jones  
Melvin Jones, Jr.  
Plaintiff

(Doc. 87, Attachment E.)

#### **IV. LEGAL ANALYSIS**

A. Motion for Leave to Late-File Opposition.

Defendant Hollenback concedes that his opposition was due November 21, 2005. He asserts that the papers were "completed and ready to be filed and served," but that Defendant's attorney, Leslie F. Jensen, "had gone out of the country on vacation during the Thanksgiving week. Her first day back at her office was Monday, November 28, 2005." Defendant apparently prepared the responsive papers himself, but did not feel it was "appropriate to send documents to the court that would carry Ms. Jensen's 'electronic signature' until she had been afforded an opportunity to review such documents." (Doc. 120 at ¶4-5.)

Of course, this does not explain why Defendant did not file the previously-prepared documents on November 28 or thereabouts. Rather, Defendant waited until just after the court issued a notice warning Defense counsel of her obligation under the local rules to file either an opposition or a statement of non-opposition. (Doc. 118.) Where a party fails to timely oppose a motion, Local Rule 78-230(c) provides that the party will not "be entitled to be heard in opposition to a motion at oral arguments...." It is the practice of the court to inquire of a party that does not file opposition to a dispositive motion whether the party intended to respond or does not oppose the

1 motion.

2       However, Defendant has requested leave to late-file the  
3 opposition. The Ninth Circuit has "repeatedly held that a motion  
4 for summary judgment cannot be granted simply because the  
5 non-moving party violated a local rule." *Couveau v. American  
6 Airlines, Inc.*, 218 F.3d 1078, 1081-82 (9th Cir. 2000). Cases  
7 should be decided on their merits whenever reasonably possible.  
8 See *Peña v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th  
9 Cir. 1985). **Plaintiff has shown no actual prejudice or  
10 inconvenience resulting from the two day delay.** Defendant  
11 presents a plausible, albeit weak, excuse for his oversight. In  
12 view of the strong preference of the law that cases be tried on  
13 their merits and lack of prejudice to plaintiff, the motion for  
14 leave to late-file Defendant's opposition is **GRANTED**.  
15 Plaintiff's motion to strike the opposition is **DENIED**. Defendant  
16 is warned, however, that future failures to comply with court  
17 deadlines will not be countenanced.

18

19       **B. Motion for Summary Judgment.**

20           **1. Standard of Review.**

21       Summary judgment is proper "if the pleadings, depositions,  
22 answers to interrogatories, and admissions on file, together with  
23 the affidavits, if any, show that there is no genuine issue as to  
24 any material fact and that the moving party is entitled to a  
25 judgment as a matter of law." Fed. R. Civ. P. 56(c). Even in an  
26 unopposed motion for summary judgment, the moving party  
27 nevertheless bears the burden of showing it is entitled to  
28 judgment as a matter of law.

1                   2.    42 U.S.C. § 1981.

2                   Plaintiff's second amended complaint relies exclusively upon  
3 42 U.S.C. § 1981 to establish subject matter jurisdiction.

4 Section 1981 provides:

5                   (a) Statement of equal rights.

6                   All persons within the jurisdiction of the United  
7 States shall have the same right in every State and  
Territory to make and enforce contracts, to sue, be  
parties, give evidence, and to the full and equal  
8 benefit of all laws and proceedings for the security of  
persons and property as is enjoyed by white citizens,  
9 and shall be subject to like punishment, pains,  
penalties, taxes, licenses, and exactions of every  
10 kind, and to no other.

11                   (b) "Make and enforce contracts" defined

12                   For purposes of this section, the term "make and  
enforce contracts" includes the making, performance,  
modification, and termination of contracts, and the  
13 enjoyment of all benefits, privileges, terms, and  
conditions of the contractual relationship.

15                   (c) Protection against impairment

16                   The rights protected by this section are protected  
against impairment by nongovernmental discrimination  
17 and impairment under color of State law.

18 42 U.S.C. § 1981. This provision prohibits private individuals  
19 as well as state actors from discriminating against an individual  
20 on the basis of his or her race with respect to that individual's  
21 right "to sue, be parties, give evidence, and to the full and  
22 equal benefit of all laws..." See *General Bldg. Contractors*  
23 *Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

24                   "Section 1981 cannot be construed as a general proscription  
25 of racial discrimination... for it expressly prohibits  
26 discrimination only in the **making and enforcement of contracts.**"  
27 *Patterson v. McLean Credit Union*, 491 U.S. 164, 176  
28 (1989) (emphasis added); see also *Georgia v. Rachel*, 384 U.S. 780,

1 791 (1966) ("The legislative history of the 1866 Act clearly  
2 indicates that Congress intended to protect a limited category of  
3 rights").

4 In this respect, [Section 1981] prohibits  
5 discrimination that infects the legal process in ways  
6 that prevent one from enforcing contract rights, by  
7 reason of his or her race, and this is so whether this  
8 discrimination is attributed to a statute or simply to  
9 existing practices. It also covers wholly private  
efforts to impede access to the courts or obstruct  
nonjudicial methods of adjudicating disputes about the  
force of binding obligations, as well as discrimination  
by private entities, such as labor unions, in enforcing  
the terms of a contract.

10 *Patterson*, 491 U.S. at 177 (1989).

11 Here, Plaintiff suggests that bringing a contempt proceeding  
12 in state court against Ms. Chhey was an effort to enforce the  
13 family law visitation contract he and Ms. Chhey signed. But, as  
14 previously noted in the order on Defendant's motion to dismiss,  
15 Doc. 103, **neither party offers any legal authority supporting or**  
16 **refuting the proposition that such a contract is protected by**  
17 **section 1981.** Some authority suggests that a wide range of  
18 contracts are covered by the provision. See *Runyon v. McCrary*,  
19 427 U.S. 160 (1976) (section 1981 reached discrimination in  
20 private education where private schools denied admission to  
21 minority children thereby interfering with parents' right to  
22 contract for educational services). The court has been unable to  
23 locate any cases imposing liability under § 1981 in circumstances  
24 that are even remotely comparable to the facts of this case.  
25 Nevertheless, for the purposes of this motion, § 1981 is applied  
26 to a private party accused of interfering with an individual's  
27 efforts access a state court to enforce a private child custody  
28 settlement contract.

1       In order to establish a claim under § 1981, it must be shown  
2 that "(1) the plaintiff is a member of a racial minority; (2) an  
3 intent to discriminate on the basis of race by the defendant; and  
4 (3) the discrimination concerned one or more of the activities  
5 enumerated in the statute (i.e., the right to make and enforce  
6 contracts, sue and be sued, give evidence, etc.)." *Mian v.*  
7 *Donaldson, Lufkin & Jenrette Secs. Corp.*, 7 F.3d 1085, 1087 (2d  
8 Cir. 1993); see *Green v. State Bar of Tex.*, 27 F.3d 1083, 1086  
9 (5th Cir. 1994).

10       It is not disputed that Plaintiff is African American,  
11 satisfying the first element. Plaintiff alleges that on April  
12 22, 2004, Defendant Hollenback told Plaintiff that he "called the  
13 Stanislaus County Housing Authority and told them what a lazy  
14 low-life black piece of shit you are...you get nigger justice."  
15 (*Id.* at ¶47.) Plaintiff also alleges that Defendant Hollenback  
16 stated that "he would knock the teeth out of his black greasy  
17 face...and rattle them out of his jive-monkey ass if he showed up  
18 for the contempt hearings." (*Id.* at ¶48.) Plaintiff asserts  
19 that "as a direct and proximate cause of the defendant's threats,  
20 [he] withdrew [the] contempt charges...." (*Id.* at ¶51.) This  
21 evidence arguably satisfies Plaintiff's *prima facie* burden.

22       Beyond the *prima facie* case requirement, Plaintiff suggests  
23 that the court should apply the familiar *McDonnell Douglass*  
24 burden shifting approach, whereby defendant would be required to  
25 respond to a *prima facie* showing by presenting a legitimate  
26 nondiscriminatory reason for the allegedly wrongful treatment.  
27 This approach has been applied in § 1981 cases concerning  
28 employment discrimination. See *Doe v. Kamehameha Schools*, 416

1 F.3d 1025 (9th Cir. 2005). However, no authority is offered that  
2 suggests the burden shifting approach is appropriate for a denial  
3 of court access for contract enforcement. The *McDonnell Douglass*  
4 burden shifting approach is designed to assist in the analysis of  
5 cases where direct evidence of discrimination is **absent**. *Vaughn*  
6 *v. Edel*, 918 F.2d 517, 520 (5th Cir. 1990).

7 Here, Plaintiff complains that Defendant uttered racial  
8 slurs and threats against him in an effort to dissuade Plaintiff  
9 from accessing the court system. Plaintiff relies upon direct  
10 evidence of discriminatory intent. See *Brown v. E. Miss. Elec.*  
11 *Power Ass'n*, 989 F.2d 858, 861 (9th Cir. 1993) (direct evidence  
12 existed where employer used the term "nigger" to refer to  
13 plaintiff).

14 Direct evidence, such as the use of racial slurs, does not  
15 necessarily entitle Plaintiff to a judgment as a matter of law.  
16 The essential question is whether Plaintiff can establish that  
17 Defendant intentionally discriminated against him on the basis of  
18 race to deprive Plaintiff of contract rights enforcement or  
19 access to the courts. This burden "remains with plaintiff at all  
20 times." *Kamehameha*, 416 F.3d at 1038.

21 There are several ways a Defendant may be able to avoid  
22 liability. For example, in an employment discrimination case  
23 where direct evidence is present, the employer can counter "by  
24 showing by a preponderance of the evidence that they would have  
25 acted as they did without regard to the plaintiff's race."  
26 *Vaughn*, 918 F.2d at 521. Modifying this test for the  
27 circumstances of this case, Defendant may counter by showing that  
28 Plaintiff would have withdrawn the contempt proceedings anyway.

1 Alternatively, Defendant may escape liability by convincing a  
2 jury that, as he maintains, the allegedly discriminatory actions  
3 never took place at all. This appears to be the approach taken  
4 by Defendant at this stage in the proceedings. Defendant has  
5 "categorically denied" making any racially derogatory statements  
6 to Plaintiff. (Doc. 120 at ¶8). This creates a dispute as to a  
7 material fact as to the racial animus element of the claim.

8 Plaintiffs motion for summary judgment must be **DENIED**.  
9

10 **C. Motion to Amend.**

11 Plaintiff requests leave to amend his complaint again, to  
12 add twenty-one (21) state law tort claims (5 counts of  
13 intentional interference with a contractual relationship; 15  
14 counts of intentional infliction of emotional distress; and one  
15 count of slander). (Doc. 166.)

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1 Plaintiff insists that the current trial date, of April 26,  
2 2006, will "remain un-affected" by any amendment. Plaintiff  
3 grossly underestimates the potential impact of an amended  
4 pleading. Defendant insists he will require additional time to  
5 respond to the claims. Plaintiff may amend his complaint, but,  
6 as a condition of amending the complaint, the case schedule will  
7 be amended accordingly. A status conference will be held March  
8 2, 2006 at 8:45 a.m.

9

10 **V. CONCLUSION**

11 For the reasons set forth above:

12 (1) Defendant's request to late-file his opposition (Doc.  
13 120) is **GRANTED**.

14 (2) Plaintiff's Motion to Strike Defendant's Opposition  
15 (Doc. 117) is **DENIED**.

16 (3) Plaintiff's motion for summary judgment (Doc. 104) is  
17 **DENIED**.

18 (4) Plaintiff's Motion for leave to amend the complaint  
19 (Doc. 166) is **GRANTED**.

20 (5) A status conference will be held March 2, 2006 in  
21 Courtroom Three at 8:45 a.m.

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23 **SO ORDERED.**

24 Dated: February 15, 2006

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26 /s/ OLIVER W. WANGER

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Oliver W. Wanger

1 UNITED STATES DISTRICT JUDGE  
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